SUPREME COURT, U. S.

in the Supreme Court of the United States

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October Term, 1970

No. 891

BLANCHE ELY PARENT TEACHERS ASSOCIATION and IRENE S. CLARKE,

Cross Petitioners,

vs.

BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY, FLORIDA, a public body organized and existing under the laws of the State of Florida; and WILLIAM C. DRAINER, Superintendent of Public Schools of Broward County, Florida; FREDERICK ALLEN and TIMOTHY ALLEN, minors by W. GEORGE ALLEN, father and next friend; and VON D. MIZELL, President of the National Association for the Advancement of Colored People, and all others similarly situated,

Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

		Page
A.	OPINIONS BELOW	2
B.	JURISDICTION	2
C.	QUESTIONS PRESENTED	3
D.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
E.	STATEMENT OF FACTS AND CASE	4
F.	REASONS FOR ISSUANCE OF THE WRIT	7
G.	CONCLUSION	13
	CERTIFICATE OF SERVICE	14

CITATIONS

	Page
Alexander v. Holmes County Board of Education, (1969) 396 U.S. 19	9
Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I)	5
Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II)	5
U. S. v. Jefferson County School Board, (C.A. 5th, 1966) 372 F.2d 836	10
Valley v. Rapides Parish School Board, (C.A. 5th, 1970) 423 F.2d 1132	10

OTHERS

Constitution of the United States:	
Amendment V	3
Amendment XIV, Section 1	3
Title 28 U.S.C. Section 1254(1)	2
Title 28 U.S.C. Section 1343(3)	5
Title 42 U.S.C. Sections 1983 and 1985	5
The Civil Rights Act of 1964	4

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CROSS PETITIONERS, BLANCHE ELY PARENT TEACHERS ASSOCIATION and IRENE S. CLARKE, by and through their undersigned attorneys, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in and for the Fifth Circuit, said judgment being entered on or about August 18, 1970.

A. OPINIONS BELOW

The opinions of the courts below directly preceding this petition are as follows and are set out in the Appendix filed in connection with the original Petition for Writ of Certiorari filed herein by the Board of Public Instruction of Broward County, Florida, to-wit:

1. Findings of fact, conclusion of law and final judgment of April 30, 1970, unreported, (1a)

2. Opinion of the Court of Appeals filed August 18, 1970, not yet reported, (32a)

3. Order of August 28, 1970, unreported, (47a) with attached school superintendent's implementation report of August 24, 1970, (54a).

4. Order of September 4, 1970, unreported, (99a).

B. JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

C. QUESTIONS PRESENTED

1. Whether the decision of the District Court for the Southern District of Florida which was affirmed by the Court of Appeals providing for the phasing out of a previously all black high school, Blanche Ely High School, serves to deny to the Cross Petitioners equal protection under the law in view of the facts and circumstances of the instant case.

2. Whether the decision of the District Court for the Southern District of Florida providing for the phasing out of Blanche Ely High School without providing the Cross Petitioners with a full evidentiary hearing on the merits of such action is a violation of the due process clause contained in the Fifth and Fourteenth Amendments to the United States Constitution.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution of the United States, Amendment V:

> *"No person shall be . . . nor be deprived of life, liberty, or property, without due process of law; . . ."*

2. Constitution of the United States, Amendment XIV, Section 1:

> *" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."*

3. The Civil Rights Act of 1964 (Pub.Laws 88-352, Title IV, Section 401; 78 Stat. 248, 42 U.S.C.A. (Chapter 21) Section 2000c-6(a)(2) which provides in pertinent part:

> *" . . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any schools by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards . . . "*

E. STATEMENT OF FACTS AND CASE

The Cross Petitioners, Blanche Ely Parent Teachers Association and Irene S. Clarke, were designated as Intervening Defendants before the Federal District Court, and on appeal to the Circuit Court of Appeals for the Fifth Circuit were Cross Appellants. Cross Petitioners now seek to have reviewed a decision rendered by the United States Court of Appeals for the Fifth Circuit on August 18, 1970, insofar as it affirmed a portion of an earlier judgment entered by the District Court for the Southern District of Florida providing for the phasing out of Blanche Ely High School, a formerly all black high school in Broward County, Florida, and discontinuing such high school as a secondary school facility.

Initially, the Respondents, Frederick Allen and Timothy Allen, minors, by W. George Allen, father and next friend, and Von D. Mizell, President of the National Asso-

ciation for the Advancement of Colored People, brought a class action against the Respondent, Board of Public Instruction of Broward County, Florida, as Defendants, on January 9, 1970, in the United States District Court for the Southern District of Florida. Jurisdiction vested in the Court under Title 28, U.S.C. Section 1343(3), and Title 42, U.S.C. Sections 1983 and 1985. The Plaintiffs contended that the Defendants were maintaining a racially segregated dual school system in violation of the principles established in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I) and *Brown v. Board of Education*, 349 U.S. 294 (1955) (Brown II).

At a hearing held before the Court on or about January 16, 1970, the District Court determined that the Board of Public Instruction for Broward County, Florida, was indeed operating a dual system of schools and ordered that a plan for the implementation of a unitary school system be filed by February 16, 1970, and to elicit recommendations from the Florida School Desegregating Consulting Center in this objective. On or about March 3, 1970, a Board plan was filed, included in which was a recommendation to phase out Blanche Ely High School. The Plaintiffs objected to the Board plan and it was ordered by the District Court that the Board consult and cooperate with the Florida School Desegregation Consulting Center in the establishment of a truly unitary plan for the school system in Broward County. A final hearing was held on April 3, 1970, following the filing of the Center's report on March 27, 1970, containing a recommendation that Blanche Ely High School be phased out as a high school facility. On that same date upon which the Final Hearing was held, April 3, 1970, the Cross Petitioners, through their undersigned attorneys, were permitted to intervene in

the cause for the purpose of objecting to the phasing out of Blanche Ely High School. On that same date the District Court entered its order granting the undersigned attorneys for the Cross Petitioners leave to file a petition or objection to the proposed phasing out of Blanche Ely High School no later than April 13, 1970, but making no allowance or provision for the taking of additional testimony or evidence on this particular subject. A notice of appearance together with a petition was thereafter filed by the undersigned attorneys on behalf of Cross Petitioners on or about April 13, 1970. It should be noted that at the April 3, 1970 final hearing on the merits, the Consulting Center's plan was received without the benefit of testimony by the Court, and no opportunity to cross examine its conclusions or the bases therefore was presented to the Cross Petitioners insofar as the recommendation contained therein to phase out Blanche Ely High School was concerned.

On or about April 30, 1970, the District Court entered its findings of fact, conclusions of law and final judgment, included in which was the determination that Blanche Ely High School was not a reasonably good high school facility and should be phased out as such. No direct testimony or evidence was ever received by the Court on this issue, but its decision was apparently based upon a letter report by an alleged education expert supplied through the Florida School Desegregation Consulting Center. Blanche Ely High School at the time of the court's order was fully accredited by both the Department of Education of the State of Florida, and by the Southern Association of Colleges and Secondary Schools as a secondary school facility.

A motion for new trial was filed by the Cross Petitioners on or about May 12, 1970, in an attempt to obtain leave to take testimony and present evidence on the questions surrounding the phasing out of Blanche Ely High School, but said motion was denied by the District Court's order dated June 4, 1970. An appeal followed to the United States Circuit Court for the Fifth Circuit and in its order dated August 18, 1970, the Circuit Court held that the Record reflected the District Court's decision on this issue was based on "sound educational criteria", and the Circuit Court therefore affirmed the decision of the District Court in this respect.

F. REASONS FOR ISSUANCE OF THE WRIT

Introduction

This cause merits review on certiorari for two main reasons. First, the action taken by the District Court and affirmed by the Circuit Court served to effectively disenfranchise, if you will, the black community of Broward County, Florida, insofar as institutions of secondary education are concerned. The result was to eliminate the neighborhood school in the black community thereby requiring the busing of black children to schools in white communities—a step taken without sufficient justification in the instant case. Secondly, in the interests of stabilizing the school situation as quickly as possible, the District Court ran afoul of the due process requirements in hearings of this nature by permitting Cross Petitioners to intervene through their undersigned attorneys of record and then denying to these parties a sufficient evidentiary hearing at which they would be permitted to present testimony and evidence in support of their cause.

I

THE DECISION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WHICH WAS AFFIRMED BY THE COURT OF APPEALS PROVIDING FOR THE PHASING OUT OF A PREVIOUSLY ALL BLACK HIGH SCHOOL, BLANCHE ELY HIGH SCHOOL, SERVES TO DENY TO THE CROSS PETITIONERS EQUAL PROTECTION UNDER THE LAW.

The District Court approved the phasing out of Blanche Ely High School for the reason it was not a reasonably good secondary school facility. The only basis for the Court's action was a strictly hearsay declaration made by an alleged educational "expert" provided through the Florida School Desegregation Consulting Center located in Miami. The opinion itself, in sketch form, provided no explanation in detail as to the conclusions reached. The high school in question was a previously all black high school located in the black community of Pompano Beach, Florida. The Court of Appeals found that the District Court's action in phasing out Blanche Ely High School was correct as being based on sound, educational criteria, and affirmed the District Court's actions in this regard.

At the time of the School Board proposal and the lower court's actions adopting same, Blanche Ely High School was a fully accredited secondary school facility by *both* the Department of Education of the State of Florida and the Southern Association of Colleges and Secondary Schools, and had been so accredited for some years. The school system of Broward County was faced with an ad-

mitted shortage of facilities. In view of these factors the Cross Petitioners would submit the phasing out of their school was not necessitated by educational criteria, but was motivated solely and exclusively by the School Board's desire *not* to send white students into a previously all black school, in a black neighborhood, as a means of desegregating the school system concerned. Simply stated, faced with this court's uncompromising mandate to provide a unitary school system *now*, the Broward County School Board elected to proceed in a manner, and utilize a process, which was designed to deny these Cross Petitioners, and parents, teachers and children connected with Blanche Ely High School, equal protection under the law.

The process of school desegregation, and the successes reached to this date, are the result of a long, tumultuous, and heart-rending struggle by the black community for equal treatment of its teachers and children in the country's school systems, together with a search for the dignity which accompanies fair and equal treatment with all of their neighbors. It has been sixteen years since the first *Brown* decision, and now the black community has been told emphatically by this court that it shall be treated equally with the white community in the school systems and such treatment shall be afforded them now. See *Alexander v. Holmes County Board of Education*, (1969) 396 U.S. 19. Once again, however, Cross Petitioners find themselves faced with action taken by a local school board which in effect deprives them of their neighborhood school and advises them they may have a desegregated school system on the high school level, but only by having their children bused to schools in white communities, one of which is in another municipality. Such action certainly is not equal or even fair treatment under the law and violates these

Cross Petitioners' constitutional rights to equal protection of the law, and hardly provides for a truly unitary school system in Broward County Florida. See *U. S. v. Jefferson County School Board,* (C.A. 5th, 1966) 372 F.2d 836; *Valley v. Rapides Parish School Board,* (C.A. 5th, 1970) 423 F.2d 1132 (where the Court held that if pairing was a reasonably and more effective means of desegregating the school system it was a device that must be used by the local school board)

II

THE DECISION OF THE DISTRICT COURT PROVIDING FOR THE PHASING OUT OF BLANCHE ELY HIGH SCHOOL WITHOUT PROVIDING CROSS PETITIONERS WITH A FULL HEARING ON THE MERITS OF SUCH ACTION IS IN VIOLATION OF THE DUE PROCESS CLAUSE CONTAINED IN THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

At hearings held before the lower court on or about March 3, 1970, recommendations were made by the School Board and by the Florida School Desegregating Consulting Center to phase out Blanche Ely High School. On April 3, 1970, the Cross Petitioners were permitted to intervene in the above styled cause, through their undersigned attorneys, for the purpose of opposing the phasing out of Blanche Ely High School, and a notice of appearance was filed by Cross Petitioners' attorney of record on April 13, 1970. On the same date, April 3, 1970, final hearing was set on the merits of the cause, included in which was

whether to approve the recommendations of the School Board pertaining to Blanche Ely High School, and the above mentioned Desegregation Center's report filed March 27, 1970, as it relates to that facility. Again, on this same date, Cross Petitioners were given leave to file a written petition or objection to the phasing out of Blanche Ely High School by April 13, 1970, which was in fact done at the time Cross Petitioners' attorneys filed their notice of appearance. No allowance for the taking of testimony and evidence in support of the Cross Petitioners' position was ever made by the trial court. No allowance was ever provided by the trial court for the Cross Petitioners to cross-examine the School Board or Desegregation Center's representatives on the basis for their findings and recommendations. The Desegregation Center's plan and report of the "expert" recommending the phasing out of Blanche Ely High School was received by the lower court without the benefit of testimony or evidence concerning the basis for reaching such a recommendation. On April 30, 1970, the lower court entered its final judgment included in which was a finding that Blanche Ely High School ought to be phased out as a secondary school facility.

It is respectfully submitted that a fundamental precept of due process was violated by the trial court in failing and refusing to allow the Cross Petitioners an opportunity to present testimony and evidence to support their claims, especially when the Court saw fit to permit them to intervene as a party to the cause. Admittedly these cases are often accelerated by the courts in an attempt to speedily settle the school situation, but no case should be accelerated to such a degree that *parties* to that action are effectively denied the right to be heard by testimony and

evidence produced by competent witnesses in support of their position in the case. Indeed, had they been given this opportunity to testify and to cross-examine School Board personnel and personnel of the Desegregation Center, these Cross Petitioners are confident the "sound, educational criteria" found to be a basis for the lower court's order phasing out Blanche Ely High School would have been clearly shown to be without merit. In effect these people have been denied their rights without any hearing, administrative or judicial, and as such have been effectively denied due process of law in the worst possible manner.

G. CONCLUSION

Frankly it is the position of Cross Petitioners supported by an overwhelming majority of the people in the community, both black and white, that the Blanche Ely High School should not be eliminated, but should be maintained as a neighborhood school with white students welcome, whether by choice or by simply straightening out the boundary lines, and with black students accorded the privilege to freely transfer to other schools should they desire.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to each of the following this _____ day of October, 1970.

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